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No. 85-469

In the Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF BELMONT, NEW HAMPSHIRE,
PETITIONER

v.

ELIZABETH DOLE, SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a Department of Transportation regulation, which provides that the agency need not make a "4(f)" determination if the Department, after appropriate consultation with historic preservation officials, concludes that an archaeological site is important chiefly for the information it contains and has minimal value for preservation in place, is consistent with Section 4(f) of the Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 934 (currently codified at 49 U.S.C. 303).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11-22) is reported at 766 F.2d 28. The opinion of the district court (Pet. App. 23-34) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1985. The petition for a writ of certiorari was filed on September 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner contends that the Secretary of Transportation violated Section 4(f) of the Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 934 (currently codified at 49 U.S.C. 303), which generally prohibits the use of park land or historic sites for highway projects unless

there is "no prudent and feasible alternative" to such use, when she determined that the archaeological sites at issue in this case are valuable chiefly for the information they contain, which is retrievable, and not for preservation in place.

1. The National Historic Preservation Act (NHPA), 16 U.S.C. 470 *et seq.*, is the primary federal statutory vehicle for the preservation of historic resources. Among other things, the NHPA created the Advisory Council on Historic Preservation (ACHP), an independent federal agency, and called for the designation by the governor of each state of a State Historic Preservation Officer (SHPO). The NHPA also established the National Register of Historic Places, which includes districts, sites, buildings, structures, and objects of national, state, or local significance in American history, architecture, archaeology, and culture. 16 U.S.C. 470a.

Under Section 106 of the NHPA, 16 U.S.C. 470f, the Secretary of Transportation must take into account the effect that approval of a highway project will have on properties on or eligible for inclusion on the National Register and must afford the ACHP a reasonable opportunity to comment on the project. The commenting process is governed by regulations promulgated by the ACHP (36 C.F.R. Pt. 800). The procedures established therein call for consultation between the Secretary (through the Federal Highway Administration) and the SHPO, followed by ACHP review, to determine whether the project will adversely affect property on or eligible for inclusion on the National Register (36 C.F.R. 800.4(b) and (c)). If the consultation process supports a finding that no adverse effect will result, the Secretary has met her responsibilities under Section 106, and the project may proceed (36 C.F.R. 800.6(a)).

Section 4(f) of the Department of Transportation Act of 1966, enacted on the same day as Section 106 of the NHPA, establishes two prerequisites to Department of Transportation approval of transportation programs or projects "requiring the use of * * * land of an historic site of national, State or local significance (as determined by the Federal, State, or local officials having jurisdiction over the * * * site)." 49 U.S.C. 303.[1] First, there must be "no prudent and feasible alternative to using that land." Second, the program or project must include "all possible planning to minimize harm" to the site resulting from the use. *Ibid.*

In 1980, DOT promulgated 23 C.F.R. 771.135(f)(1) in an effort to coordinate and reconcile Section 106 of the NHPA with Section 4(f). The regulation states that, in general, Section 4(f) applies to archaeological sites on or eligible for inclusion on the National Register. However, Section 4(f) does not apply if the Federal Highway Administration, after consultation with the SHPO and the ACHP, determines that "the archaeological resource is important chiefly for the information it contains and has minimal value for preservation in place" (23 C.F.R. 771.135(f)(1)). If such a determination is made, the archaeological resources may be recovered in accordance with an appropriate "resource recovery plan" (*ibid.*) developed in compliance with 36 C.F.R. Pt. 800. By differentiating archaeological resources possessing in-place value from those that do not, the regulation limits application of Section 4(f) to those situations presenting the land use concerns addressed by that statute.

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[1]Section 4(f) of the Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 934, was originally codified at 49 U.S.C. (1970 ed.) 1653(f). Section 7(b) of Pub. L. No. 97-449, 96 Stat. 2444, repealed 49 U.S.C. (1970 ed.) 1653(f) and recodified that statute, without substantive change, as 49 U.S.C. 303. Section 18(a) of the Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, 82 Stat. 823 (currently codified at 23 U.S.C. 138), is essentially identical to Section 4(f). All of these provisions will be referred to herein as "Section 4(f)."

2. Petitioner brought this action in the United States District Court for the District of New Hampshire, contending that the Secretary was required to prepare a "Section 4(f) determination" regarding the lack of prudent and feasible alternatives to the "use" of the Lochmere Archaeological District for the construction of a proposed bypass of U.S. 3-N.H. 11. Specifically, petitioner contended that the Secretary's archaeological regulation, 23 C.F.R. 771.135(f)(1), was invalid because it allegedly permitted the Secretary to escape her obligations under Section 4(f).

Federal and state highway officials determined that the proposed bypass is needed to alleviate traffic congestion on the existing highway and to prevent accidents resulting from that congestion. Pet. App. 12-13, 24. The bypass project, for which the State of New Hampshire sought federal funding from the Department of Transportation, would supplement the present roadway with a four-lane limited access highway through a generally rural area that includes the Lochmere Archaeological District. *Id.* at 24. Pursuant to the challenged regulation, and in view of the facts below, DOT determined that Section 4(f) was inapplicable to the proposed project.

The Lochmere Archaeological District is an example of an archaeological resource with minimal in-place value. The District, comprising approximately 90 acres, contains sites of prehistoric Native American occupation and historic Euro-American settlement and industry, and it is listed on the National Register. Pet. App. 13, 25. In forms submitted in support of the District's nomination to the National Register, the significance of the District was described as "strictly archaeological" (*id.* at 25). The district court, drawing upon those same nomination forms, described the area as follows (*ibid.*):

> There are no historic buildings within the District. Rather, it is dotted with abandoned cellarholes (some of which are only visible when the water is low) and various stone artifacts. The District is hardly in a pristine state. "Areas of major disturbance" include "house lots, landscaped areas, railroad cut and fill, powerlines and roads; a new hydro-electric facility on the east side of the river is now under construction by state and federal agencies."

In a December 11, 1980 letter to the New Hampshire state highway authorities, the New Hampshire SHPO acknowledged Lochmere's potential eligibility for the National Register.[2] Nonetheless, he stated his opinion that "the significance of the site will lie in the data it contains and retrieval of the data is the recommended course of action that will serve the interest of historic preservation." C.A. App. 83. The SHPO requested that his determination be "construed as a finding of 'No adverse effect on archaeological resources' " within the meaning of 36 C.F.R. Pt. 800. C.A. App. 83. He conditioned that request on the assurance that certain commitments to an archaeological resource recovery program satisfactory to state and federal preservation authorities be included in the project's final Environmental Impact Statement (FEIS) and satisfied before the onset of construction. C.A. App. 83-84.

The state highway agency consented to the SHPO's condition and thereafter requested and received the Federal Highway Administration's concurrence in the "no adverse effect" finding. The Federal Highway Administration also agreed with the state agency that a Section 4(f) evaluation was not required. C.A. App. 178.

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[2]The District was nominated for inclusion on the National Register as the result of surveys conducted during the assessment of the environmental impacts of the bypass project. It was placed on the Register on November 1, 1982. Pet. App. 24-26.

The FEIS for the bypass project was completed in June 1981. The FEIS discussed three intensive surveys of archaeological resources undertaken in the Lochmere area. The FEIS noted that, as determined by the SHPO, the value of the site lies primarily in the resources it contains rather than in the site itself and acknowledged the resource recovery commitments made by the state highway agency. FEIS, § F, ch. 13. Accordingly, the FEIS concluded that the project would not "use" land of archaeological significance so as to require preparation of an evaluation pursuant to Section 4(f). FEIS, § J.

The FEIS was furnished to the ACHP in July 1981. That agency offered no objection to the decision to recover the archaeological resources or to the determination that no Section 4(f) statement was required with respect to the Lochmere Archaeological District. Thus, as required under 23 C.F.R. 771.135(f)(1), the Secretary consulted the appropriate state and local preservation authorities and determined, without reference to Section 4(f), that the project would not adversely affect property subject to Section 106 of the NHPA.

The district court rejected the Secretary's reconciliation of Section 106 of the NHPA and Section 4(f), concluding that 23 C.F.R. 771.135(f)(1) is "void" as in conflict with the statutory mandate of Section 4(f). Pet. App. 23-34. The district court enjoined the bypass project pending preparation of a 4(f) determination. Pet. App. 35-36.

The court of appeals reversed, finding no conflict between the regulation and Section 4(f)'s language or purpose. Pet. App. 11-22. Moreover, the court of appeals concluded that the regulation furthers the preservationist goals of Section 4(f) by promoting, in appropriate instances, resource recovery in accordance with regulations promulgated under the NHPA. Pet. App. 18-19. Petitioner's challenge to

DOT's compliance with 23 C.F.R. 771.135(f)(1) in this particular case was remanded to the district court. Pet. App. 20.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant further review.

1. The single issue entertained by the court of appeals was whether the challenged regulation is reasonable and consistent with Section 4(f). Pet. App. 15. Petitioner's contention that the Lochmere District has "associational" or in-site significance (Pet. 8-9) and therefore does not fall within the regulatory exemption from Section 4(f) has nothing to do with the issue decided by the court of appeals and must be raised before the district court on remand, if at all. See Pet. App. 20.[3]

The issue actually decided by the court of appeals—the validity of 23 C.F.R. 771.135(f)(1) under Section 4(f)—was a question of first impression.[4] Contrary to petitioners'

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[3]In any event, Lochmere's status as a "district" included on the National Register does not denote in-site value. A "district" on the National Register is defined at 36 C.F.R. 60.3(d) as

> a geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events or aesthetically by plan or physical development. A district may also comprise individual elements separated geographically but linked by association or history.

Thus, the Lochmere Archaeological District is a geographic designation indicating only that a "concentration * * * of sites * * * or objects" of archaeological interest lies within the District's lines.

[4]In the only other reported case citing the regulation, its validity was not at issue. *Arizona Past & Future Foundation* v. *Lewis*, 722 F.2d 1423, 1427 (9th Cir. 1983). Petitioner implies (Pet. 9) that the regulation was rejected in *Benton Franklin Riverfront Trailway & Bridge Comm.* v. *Lewis*, 701 F.2d 784 (9th Cir. 1983). In fact, that case did not involve archaeological resources at all, and the validity of DOT's archaeological regulation was not even remotely at issue.

vigorous assertion (Pet. 6), the court of appeals' decision does not conflict with *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402 (1971), which dealt with the propriety of, and standards for, judicial review of Section 4(f) determinations under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* While *Overton Park* discussed the general import of Section 4(f)'s mandate, the Court did not there decide the scope of that Section's application to specific cases. Cf. *Concerned Citizens on I-190* v. *Secretary of Transportation,* 641 F.2d 1, 7 (1st Cir. 1981).

The regulation at issue reflects the Secretary's view that Section 4(f) does not apply to archaeological sites if the archaeological resource is important chiefly for the information it contains and may be recovered in accordance with a plan developed in compliance with 36 C.F.R. Pt. 800. As a form of "agency action" under the APA, 5 U.S.C. 551(13), the regulation may be voided only if its terms are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Under this standard, a court may not set aside a regulation that has a rational basis and does not exceed or violate statutory authority. *FCC* v. *National Citizens Committee for Broadcasting,* 436 U.S. 775, 802-803 (1978).

The court of appeals correctly determined that 23 C.F.R. 711.135(f)(1) is reasonable and not contrary to Section 4(f). See, *e.g., Chevron U.S.A. Inc.* v. *NRDC,* No. 82-1005 (June 25, 1984); *Schweiker* v. *Gray Panthers,* 453 U.S. 34, 43-44 (1981); *Batterton* v. *Francis,* 432 U.S. 416, 424-426 (1977). The administrative history of the regulation explains the unique factors that come into play when archaeological resources are involved and discloses a reasoned effort to harmonize the procedures for compliance with Section 106 of the NHPA and Section 4(f) (45 Fed. Reg. 71976 (1980) (emphasis added)):

> Frequently, the consultation required by section 106 results in a determination that data recovery is the appropriate form of mitigation for the archaeological site. *Such determinations are typically made when the recovery of the material contained in or on the site renders more valuable information than leaving such material at the specific location.* Applying section 4(f) to archaeological sites where data recovery is appropriate would impose the section 4(f) test to sites for which all interested agencies have agreed that removal of the archeological material is in the best public interest. *This regulation incorporates current DOT policy by applying section 106 and section 4(f) to archeological sites sequentially. If data recovery under section 106 is appropriate, then section 4(f) would not apply, since recovery results in the removal of materials which make the site significant for purposes of section 4(f).* It should be noted that section 4(f) continues to apply to archaeological sites on or eligible for the National Register where the site has significance for reasons other than the materials contained.

As contemplated by DOT and as applied in this case, the regulation operates as a screening mechanism preliminary to Section 4(f) compliance procedures. It designates a subset of historic sites—those containing resources determined to have "minimal value for preservation in place"—that would otherwise be subject to Section 4(f)'s requirements. For this subset, the critical question is one of resource preservation, not land use. If analysis under Section 106 of the NHPA shows that the proposed construction project can be accomplished without adversely affecting the significant archaeological values involved, that is, if the *artifacts* may be safely relocated, there is no reason in law or policy to apply Section 4(f) so as to prohibit use of the *site* for highway purposes. Properly understood, the

regulation does not, as petitioner claims (Pet. 7), invert the requirements of Section 4(f) by calling for harm-minimization efforts or land use prohibitions prior to any study of feasible and prudent alternatives. Instead, it provides for appropriate resource preservation when the "significance" of an historic site may be effectively extracted from the land.

2. As demonstrated above, the regulation differentiates between archaeological resources based on their in-place value: only those without in-place significance undergo the Section 106 analysis triggered by the regulation. This approach is entirely consistent with the goals of both the NHPA and Section 4(f). Section 4(f) was primarily intended to preserve public parks, recreation areas, wildlife and waterfowl refuges, and historic sites. See 49 U.S.C. 303(c). Congress's principal concern in enacting the statute was to assure that, to the extent possible, highways and other federally-funded transportation projects would not diminish or destroy the recreational and aesthetic qualities of the protected lands. By contrast, the sole focus of the NHPA is the protection of historic resources. Accordingly, the NHPA, not Section 4(f), is Congress's primary enactment to preserve artifacts that fall within the exemption created by 23 C.F.R. 771.135(f)(1).

Petitioners seek invalidation of 23 C.F.R. 771.135(f)(1) and mandatory application of Section 4(f) in this case in spite of the absence of any in-place value in the archaeological resources in the Lochmere District. However, the Section 106 compliance procedures triggered by the regulation provide for full protection of the District's archaeological resources and adequate consultation with both state and local preservation authorities. Substitution of Section 4(f)'s mandate for those procedures would serve no purpose; indeed, recovery and relocation of significant artifacts from a site that is "hardly pristine" and already littered with

"[a]reas of major disturbance" (Pet. App. 25) is in the best interest of archaeological preservation. The court of appeals correctly took these considerations into account (Pet. App. 16-19).

In any event, the decision in this case is not of sufficient importance to warrant this Court's review. The challenged regulation recognizes only carefully limited circumstances in which Section 4(f) does not apply and, as the court of appeals observed, it contains sufficient substantive and procedural safeguards to prevent abuse. Pet. App. 19. Even the district court conceded that the regulation is sensible. *Id.* at 32. The question of its validity was correctly decided by the court of appeals, and it has not arisen elsewhere.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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